No. 90-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION BANK,

Petitioner,

v.

HERBERT WOLAS, CHAPTER 7 TRUSTEE FOR THE ESTATE OF ZZZZ BEST CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This case concerns an ordinary commercial loan transaction and payments by the now-bankrupt borrower of regular minimum monthly interest charges and a small loan availability fee made to the Bank strictly in accordance with its loan documents and in a regular manner consistent with ordinary credit practices.[1] Pet. App. D at 12a, 14a. In support of the decision of the court below treating these payments as recoverable preferences, Respondent urges this Court to rewrite the language of § 547(c)(2)(A) so that the term "debt" as it appears

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[1] In opposition to the Bank's summary judgment motion and in support of its cross-motion for summary judgment, the Trustee submitted no evidence contesting the ordinariness of the loan payments or of the loan terms.

there includes only "short-term trade debt" and not longer-term debt, which is at issue here.

Respondent's primary argument is that the legislative history of the statute shows that Congress "forgot" to promote the primary goal of the 1978 preference statute —equality of distribution—when it eliminated the 45-day rule and set forth no other limitation in the statute to prevent payments on all types of debts from being eligible for protection against preference avoidance. Although Respondent concedes that the legislative history of the 1978 Bankruptcy Code reveals other policies of the preference laws in addition to equality of distribution—i.e., maintaining normal business relations and preventing a race to the courthouse—Respondent argues that the Court should presume Congress would have preferred to promote equality of distribution over the other policies and should further presume that Congress would have found the equality of distribution goal to be better served by limiting the protection of § 547(c)(2) to short-term trade debt.

Even if Congress had inadvertently deleted the 45-day provision, "forgetting" to make any other limitation on the term "debt" in § 547(c)(2), it would not be the Court's role to conceive and write limiting language into the statute. A court's perception that a particular result is unreasonable is only relevant to an interpretation of an *ambiguous* statute and "cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121, 96 L.Ed.2d 97, 107 S. Ct. 2275 (1987). "It frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (Emphasis in original.) *Rodriguez v. U.S.*, 480 U.S. 522, 526, 94 L.Ed.2d 533, 107 S. Ct. 1391 (1987). *See West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. ——, 113 L.Ed.2d 68, 84, 111 S. Ct. 1138 (1991) ("it is not our function to eliminate clearly expressed inconsistency of policy, and to

treat alike subjects that different Congresses have chosen to treat differently"). *See also United States v. Shreveport Grain & Elevator Co.*, 278 U.S. 77, 83, 77 L.Ed. 178, 53 S. Ct. 42 (1932) (committee reports "cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms"). Respondent cannot rely on generalized fragments of legislative history to provide a basis for ignoring the plain meaning of a statute. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380, 98 L.Ed.2d 740, 108 S. Ct. 626 (1988).

In any event, there is no basis for believing that Congress's deletion of the 45-day limitation—without further qualification of the word "debt"—was at all inadvertent. The legislative history of the 1984 statute plainly expresses congressional concern that the 1978 version of § 547(c)(2) had interfered with normal financial relations so that "payments received in good faith by creditors were the subject of recovery actions." S. REP. No. 446, 97th Cong., 2d Sess. 24 (1982).[2] Congress intended that "regular payments, made voluntarily by the debtor in the ordinary course of business" would not be recoverable as preferences. *Id.* at 43. This legislative history is consistent with the plain language of the statute. *See* Brief of Petitioner at 12-17. The elimination of the 45-day rule is also no more in conflict with the goal of promoting equality of distribution than any other excep-

[2] Respondent's analysis improperly imputes to a later Congress the same legislative intent as that of Congress in 1978 in assuming that Congress intended to promote the equality of distribution principle above the concern of maintaining normal financial relations with all types of creditors when it eliminated the 45-day rule in 1984. *See* Brief of Respondent at 7 (in which Respondent cites legislative history from the 1978 Code to support the proposition that Congress intended to limit the ordinary course of business exception as amended in 1984 to trade debt).

tion of § 547(c) that allows a preference to remain unrecoverable.[3]

It is noteworthy that the language of the statute the Court is being asked to interpret in this case appears nowhere in Respondent's brief. The language in question protects transfers "in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs." 11 U.S.C. § 547(c)(2)(A). The term "debt" means "liability on a claim." 11 U.S.C. § 101(12). To import the qualification of "short-term" and "trade" to the word "debt" is to fundamentally rewrite the statute based on the improper speculation that Congress did not really mean what it plainly said.

In the course of arguing for a judicial narrowing of the terms of § 547(c)(2), Respondent notes that the 1984 amendment of the statute was prompted by problems encountered in the application of the 45-day rule to certain trade debt, commercial paper and consumer debt. *See* Brief of Respondent at 9-11. Respondent concedes that loans evidenced by commercial paper have maturities of up to 270 days and that in floor statements before the passage of the bill Senators Dole and DeConcini made it clear that payments on commercial paper are to be protected under the ordinary course of business exception as amended in 1984. *See id.* at 12 n.17, 31-32; 130 CONG. REC. S8897, *reprinted in* App. 3 COLLIER ON BANKRUPTCY ch. XX, p. 80 (15th ed. 1990).

The revolving line of credit issued by the Bank in this case had a term of eight and one-half months, and the term of the "long-term" loan in *Matter of CHG Int'l, Inc.*, 897 F.2d 1479 (9th Cir. 1990), relied on by the Ninth Circuit in the *ZZZZ Best* decision, was *seven*

[3] In fact, there are six other exceptions to the trustee's right to recover transfers deemed to be preferential. The existence of these numerous other exceptions in § 547(c) confirms Congress's willingness to put aside the equality of distribution goal in favor of other, more compelling considerations when Congress deems it appropriate.

months. The commercial loans in these two Ninth Circuit decisions thus had shorter terms than commercial paper, which was unequivocally intended to be protected by the elimination of the 45-day rule. To adopt Respondent's position that the statute only protects payments on short-term trade debt yet accommodate the clear mandate of Congress that payments on long-term commercial paper be protected, Respondent would have the Court rewrite the simple term "debt" to create not only a limitation on the protection to short-term debt but also a special exemption to the limitation to protect payments on commercial paper with a term of up to 270 days. Such a reading of the statute would be absurd.

Finally, Respondent urges that judicial rewriting of the statute is necessary to avoid departure from "a long line of statutory and judicial history," which allegedly protected payments only on short-term trade debt. Brief of Respondent at 7. In fact, for 80 years the provisions of § 60 of the former Bankruptcy Act never distinguished between trade debt and long-term obligations. *See* Brief of Petitioner at 12-13; Brief of Amicus Curiae California Bankers Association at 20-21. Respondent, at footnote 35, specifically concedes as much. *See* Brief of Respondent at 16 n.35. The "long history" of only protecting payments on trade debt applies to a period of five years from 1979 to 1984, when the preference statute was revised to limit the statute's protection to debt that was paid within 45 days of the date it was incurred.

Respondent has cited several cases to support his claim that protection against preference attack was historically limited to trade debt. None of those cases supports that claim since all of the cases involve the interpretation of the 1978 Bankruptcy Code. Any references to limiting the application of § 547(c)(2)(A) exclusively to trade debt or short-term debt consist of passing references in *dicta* only.

The issue in *Barash v. Public Fin. Corp.*, 658 F.2d 504 (7th Cir. 1981) (*see* Brief of Respondent at 14, 34, 41) was whether regular payments on installment loans were voidable as preferences. The court concluded that some of them were, solely on the ground that the payments did not come within the 45-day rule. Since that rule has now been repealed, the rationale of *Barash* has no bearing on this case. Further, more recently the Seventh Circuit has noted in *dicta* in *Levit v. Ingersoll Rand Fin. Corp. (In re Deprizio Constr., Inc.)*, 874 F.2d 1186, 1200 (7th Cir. 1986), that required monthly payments made over a year on a long-term note, if made on time, are protected under the current version of § 547(c)(2).

The Eleventh Circuit in *In re Craig Oil Co.*, 785 F.2d 1563 (11th Cir. 1986), also relied on by Respondent (*see* Brief of Respondent at 33-34), based its decision on the fact that payments were not in fact made in the ordinary course of business.[4] Its discussion of the (c)(2) exception as "directed primarily to ordinary trade credit transactions," 785 F.2d at 1567, in a case arising when the 45-day rule was in effect, is not helpful in understanding the state of the law either before October 1979 or after the 45-day limitation was stricken in 1984.

Respondent's judicial and statutory authorities in fact reveal that the 45-day rule and its resulting limitation to short-term trade debt was a new development in the 1978 Code which was roundly criticized after less than two

[4] The First Circuit in *WJM, Inc. v. Massachusetts Dep't of Pub. Welfare*, 840 F.2d 996, 1010 (1st Cir. 1988), cited by Respondent in a footnote (Brief of Respondent at 36 n.102) as offering some distant support for its view, also went off on this ground. The bankruptcy court decision in *In re Magic Circle Energy Corp.*, 64 Bankr. 269 (Bankr. W.D. Okla. 1986), *see* Brief of Respondent at 36 n.102, included very limited and cryptic comments which the court itself said were not "pertinent to the matter at bar." The court in that case found that a workout agreement did not transmute ordinary trade debt into a debt that was not incurred in the ordinary course of business or financial affairs.

years in operation and was quickly abandoned when the 1984 amendment deleted the 45-day rule. These authorities provide no basis for the Court to deviate from the plain meaning of the statute when Congress's intent is unequivocally expressed through a series of special exceptions, all of which protect admittedly preferential payments and therefore do not promote the equality of distribution goal.

CONCLUSION

Petitioner Union Bank respectfully submits that the Ninth Circuit erred in overturning the decisions of the bankruptcy and district courts in this matter and that the decision of the Ninth Circuit should be reversed.[5]

[5] Section VII of the Respondent's Brief urges a separate and distinct limitation in contradiction to the plain meaning of the statute based upon a line of cases applicable to *investors* in "Ponzi schemes." In the Ponzi scheme line of cases, investors who have fueled the scheme by investing money on the promise of receiving windfall profits are not protected because their "investments" are clearly not ordinary course transactions. This line of cases does not apply to a commercial bank lender involved in a routine loan transaction who is not an investor and had no expectation of any extraordinary profits. Appendix D to Petition for Writ of Certiorari at 14a-15a, Conclusions of Law, paras. 9 and 10. Because this issue was not decided by the Ninth Circuit, the Court has a choice of either reversing and remanding the case to the Ninth Circuit or simply reversing. Since, as a matter of law, the Ponzi line of cases does not apply to a bank in a routine commercial loan, Respondent's argument is plainly without merit and Petitioner urges the Court to reverse.

Respectfully submitted,

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